



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Harry Knox, Chairman
State Board of Control
Austin, Texas

Dear Sir:

Opinion No. O-4019
Re: Power of superintendents of
eleemosynary institutions to
discharge patients.

You asked the opinion of this Department upon
the following questions:

May the superintendents of a State hospital for
the mentally ill arbitrarily discharge a patient committed
thereto by a court and jury:

- a. In the absence of a court order?
- b. In the absence of permission or re-
commendation of the Board of Control?

Section 3 of Article 693, prescribing the powers
and duties of the Board of Control, provides in part that
the Board shall have power: "To discharge, upon recommen-
dation of the superintendent, any officer, employe or in-
mate. . . ."

Article 3175 provides in part:

"Each superintendent shall: (1) Receive
and discharge patients"

Article 3176 provides in part that the superin-
tendent shall have power: "To remove for good cause, with
the consent of the Board, any officer, teacher or employe.
. . . ."

It is to be noted that, in the case of discharg-
ing officers, teachers, and employees, the Board and the

superintendent exercise a joint authority under statute, neither can act without the recommendation or consent of the other. (See our Opinion No. 0-1857) But in the case of discharging patients, the Legislature did not thus circumscribe the authority of the superintendent. Instead, it empowered the superintendent to "discharge patients", without conditioning the exercise of such authority upon "the consent of the Board."

Observing the language used by the Legislature in respect to the discharge of officers and employees by the superintendent, as compared with that used in respect to the discharge of patients by him, we are of opinion that the Legislature did not intend that the superintendent must have the permission of the Board to discharge patients. We believe it was intended to confer upon the superintendent the broad authority to discharge patients, and that the power of the Board to discharge patients is cumulative of that possessed by the superintendent, the Board's power in such respect being restricted by limiting its exercise to those instances where the superintendent recommends the discharge.

If reason for such construction, independent of the language of the statutes, need be assigned, we think it is found in the nature of the power to be exercised. The superintendent of the institution is required to be a skilled physician experienced in the treatment of insanity. Article 3184. Whether a patient is to be discharged must be determined by an appraisal of his physical and mental condition, with due regard for his own welfare and that of the public. This is an issue which can be resolved effectively only from personal observation of the patient by a skilled physician experienced in the diagnosis and treatment of mental diseases. In the absence of language requiring such construction, we are not prepared to hold that the Legislature intended that the judgment of the superintendent in respect to this matter should be reviewed by the Board, whose manifold duties do not permit of personal observation of patients, and whose members are not required to possess the qualifications necessary to

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determine the question involved.

That the Legislature intended the power to discharge patients to be exercised by the superintendent without prior permission or approval of the Board is further evidenced by the policy expressed in Article 31931, Vernon's Revised Civil Statutes, which expressly commits to the superintendent alone the decision upon the question of allowing inmates to leave the institution for temporary periods of absence not exceeding twelve months, with additional leave of absence at the expiration of such period to be granted "by the superintendent or upon his recommendation". No sufficient reason appears why the Legislature would have conferred upon the superintendent the broad power to allow temporary absences without requiring the consent of the Board thereto, while requiring the Board's consent to a discharge.

Your question as to whether the superintendent may discharge a patient without permission of the Board is therefore answered in the affirmative. You asked whether the superintendent may discharge a patient "arbitrarily". If you mean to inquire whether the Legislature intended that the superintendent should exercise an unbridled discretion to discharge a patient without regard to his physical or mental condition, the welfare of the patient and that of the public, we answer that no such power was intended to be conferred. The statute contemplates that the superintendents shall be vested with discretion to determine whether the condition of the patient is such that with due regard for his welfare and that of the public he may be discharged from the institution. It is intended that this discretion will be exercised reasonably, rather than arbitrarily. However, as in the case of every public officer to whom the exercise of an official discretion is confided, there always exists the power in the officer, though not the right, to decide wrong as well as right. Where a discretion is confided to a public officer, it is possible that he may abuse it. That he may abuse it, however, does not argue against the existence of the authority. Where the decision of the officer is final, as here, the remedy for abuse of discretion, or arbitrary action, is removal of the offending officer.

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A court order is not a condition precedent to the discharge of a patient by the superintendent. No statute that we have been able to find makes it so. The commitment of a patient is not for punishment, but for treatment. The order of commitment does not prescribe--indeed, the court is not empowered to determine--that the person shall be confined in the institution for a definite period of time. The period of confinement hinges upon the physical and mental condition of the patient; to the superintendent of the institution, as noted above, is committed by statute the power of discharge when, in his opinion, the condition of the patient warrants it.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED JAN 14, 1942

Wm. C. Miller
FIRST ASSISTANT
ATTORNEY GENERAL

By

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RWF:LM

APPROVED
OPINION
COMMITTEE

BY *RWF*